BOBBY L. FRANKLIN

IBLA 89-35 Decided August 27, 1990

Appeal from a decision of the District Manager, Las Vegas District, Nevada, Bureau of Land Management, rejecting desert land entry application N-49548.

Reversed and remanded.

1. Desert Land Entry: Applications--Desert Land Entry: Lands Subject To--Mining Claims: Location--Segregation

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

APPEARANCES: Bobby L. Franklin, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Bobby L. Franklin has appealed from a decision of the District Manager, Las Vegas District, Nevada, Bureau of Land Management (BLM), dated October 13, 1988, rejecting his desert land entry (DLE) application, N-49548, stating "the public lands affected by your DLE filing N-49548, are appropriated (by mining claims) and thereby rendered unsuitable under the Desert Land Act and not subject to disposition."

In his statement of reasons for appeal, appellant challenges the propriety of the decision on the basis that there has been no physical labor or mining production on the land in question over the past 5 years. Although there were multiple filings of mining claims and a mineral patent application (N-46678) filed involving 1,280 acres of valuable land in Laughlin, Nevada, he asserts nothing has been done to work these claims and the development of his DLE should not be held up indefinitely.

The record shows that appellant filed DLE application N-49548 with BLM on August 18, 1988, pursuant to 43 U.S.C. § 321 (1982). The application described 80 acres of land located in the SE¼ and the SW¼ of sec. 16, T. 32 S., R. 66 E., Mount Diablo Meridian, Clark County, Nevada. On the same date appellant filed a protest of mineral patent application N-46678 which had been previously filed with BLM May 27, 1987, by J. H. Edgar et al., for the Rojas Nos. 1-8 placer mining claims covering approximately 1,231.52 acres of public land in the same area in T. 32 S., R. 66 E.

BLM records confirm that the patent applicants submitted the required proofs, paid the filing fees, and deposited the required purchase money for the mineral entry final certificate for these Rojas Nos. 1-8 claims October 3, 1988. On November 28, 1988, BLM issued a decision noting that the mineral entry was allowed and the final certificate was issued effective that date. By letter of April 17, 1989, the applicants requested that mineral patent application N-46678 be withdrawn in its entirety because the company that was going to purchase black sands from the claims had gone out of business. BLM accepted the withdrawal request and the mineral entry involving the Rojas claims was cancelled as of April 17, 1989. 1/

The Board has noted that classification of the land as suitable for entry pursuant to section 7 of the Taylor Grazing Act "is a prerequisite to the approval of all entries" made under the desert land laws. 43 CFR 2400.0-3. 2/ James A. Maleski, 102 IBLA 175, 180 (1989). Because no DLE applications may be allowed until the land has been classified as suitable for such entry, BLM must first look to see whether or not the land is classified or should be classified as open to DLE. In this instance the lands have not been previously opened to entry under the desert land laws. Although appellant's application also serves as a petition for classification where the land has not been classified, that classification determination has yet to be made by BLM this case. 3/

However, irrespective of the lack of classification, BLM attempted to dispose of the application on the lack of availability of the land due to the conflicting mining claims of record. BLM rejected appellant's application, stating: "Regulations contained under 43 CFR 2520.0-8(a)(1) state in part: [I]n order for public lands to be subject to entry under the

1/ By a decision, dated May 2, 1989, BLM accepted the applicants withdrawal of the mineral patent application and cancelled the mineral entry which included the Rojas Nos. 1-8 placer claims.

2/ Characteristics of land subject to disposition under the Desert Land Act are set forth in 43 CFR 2520.0-8. In Departmental regulation 43 CFR 2400.0-3(a), BLM notes that classification pursuant to 43 U.S.C § 315(f) (1982), is a prerequisite to approval of a DLE under 43 CFR Part 2520. Under 43 CFR 2521.2, an application must include a petition for classification unless the lands described in the application have been opened for disposition under the desert land laws. See generally 43 CFR Part 2450. This Board has affirmed the rejection of DLE applications on the ground that the land had not been classified as suitable for entry. See Duella M. Adams, 70 IBLA 63 (1983).

3/ Section 16 of the DLE application specifically provides an alternate petition for classification stating: "If the lands described in this application have not been classified as suitable for desert entry pursuant to the provisions of Section 7, of the Taylor Grazing Act of June 28, 1934, as amended, (43 CFR 315F), and the requirements of the regulations in 43 CFR Part 2400, please consider the application as a petition for such classification."

desert land law, such public lands must not only be irrigable but also surveyed, unreserved, unappropriated, nonmineral in character * * *."

[1] Although BLM has not made an official determination based on a mineral report that the lands are, in fact, "mineral in character," BLM may have based its rejection of appellant's DLE in part on a presumption to that effect because of placer mining claim filings and a mineral patent application on record in the same area. However, this Board has recently noted that the mere fact of location of a mining claim does not establish the mineral character of the land. Nancy M. Swallow, 112 IBLA 321, 323 (1990), and cases cited therein. In Swallow we held that where BLM itself does not recognize the land described by DLE applications to be mineral in character, applicants are not precluded from entering this land under the desert land law for this reason. See California v. Rodeffer, 75 I.D. 176, 179 (1968). We find no clear evidence in the record to support the conclusion that the land in question is mineral in character.

As to BLM's conclusion that the lands are appropriated by mining claims, we have repeatedly recognized that longstanding Departmental precedent makes it clear that a mining claim segregates land from entry by others when a final certificate of mineral entry has been issued. Nancy M. Swallow, supra; See also Melvin Helit, 110 IBLA 144, 149-50 (1989); Scott Burnham, 100 IBLA 94, 110, 94 I.D. 429, 437 (1987). In the case at hand, the record is clear that, as of August 18, 1988, the date the DLE application was filed, no final certificate of mineral entry had issued. Accordingly, we find the lands in question were not appropriated at the time the DLE application was filed.

For the above reasons, we conclude that BLM's decision of October 13, 1988, should be reversed. Since the mineral patent application has since been withdrawn and the mineral entry cancelled, BLM should reconsider appellant's application and determine whether the land should be classified as open to DLE.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to BLM for action consistent with this opinion.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge